

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

Kerrie Borboa, et al,

Plaintiffs,

versus 3:13CV844

Theodore L. Chandler, et al,

Defendants

before: HONORABLE JOHN A. GIBNEY, JR.  
United States District Judge

Settlement

April 13, 2015  
Richmond, Virginia

Gilbert F. Halasz, RMR  
Official Court Reporter  
U. S. Courthouse  
701 East Broad Street  
Richmond, Virginia 23219

(804) 916-2248

APPEARANCES

Mark K. Gyandoh, Esq.

Charles L. Williams, Esq.

for the plaintiffs

Olivia S. Singelmann, Esq.

David Leland, Esq.

Scott Fredericksen, Esq.

David Hickerson, Esq.

for the defendants

1 THE CLERK: Case number 13 CV 844.

2 Kerrie Borboa, et al. versus Theodore L.

3 Chandler, et al.

4 Plaintiffs are represented by Mr. Mark Gyandoh

5 and Mr. Charles Williams.

6 Defendants are represented by Mr. Scott

7 Fredericksen, Olivia Singelmann, David Hickerson, and

8 David Leland.

9 Are counsel ready to proceed?

10 MR. GYANDOH: We are.

11 MR. FREDERICKSEN: Good afternoon, Your Honor.

12 Yes.

13 THE COURT: Good afternoon.

14 We are here today for the preliminary approval

15 of a settlement agreement in this case.

16 And let me just ask Mr. Gyandoh --

17 MR. GYANDOH: Gyandoh.

18 THE COURT: -- some questions here.

19 MR. GYANDOH: Sure.

20 THE COURT: I had an interesting time struggling

21 through these documents this weekend. Can you tell

22 me where in the settlement agreement it says the

23 amount?

24 MR. GYANDOH: Of course, Your Honor.

25 THE COURT: I can't hear you.

1 MR. GYANDOH: Sure.

2 THE COURT: I can't hear you.

3 MR. GYANDOH: Oh.

4 THE COURT: Now I hear you.

5 I am looking at the settlement agreement.

6 MR. GYANDOH: On page two of the settlement  
7 agreement, definition 1.13.

8 THE COURT: Oh, there it is. The amount.

9 Good. Let me see if I understand exactly, or  
10 maybe inexactly, how this money gets distributed.

11 Essentially you take all the members of the  
12 class and you determine what their net losses are,  
13 and then you give them their proportional share of  
14 the five million dollars. Is that fair?

15 MR. GYANDOH: That's correct, Your Honor. It  
16 will actually be the net settlement amount. So if is  
17 five subtracted --

18 THE COURT: Minus the costs and fees and so  
19 forth.

20 MR. GYANDOH: Exactly.

21 THE COURT: Okay.

22 How many people are in the class?

23 MR. GYANDOH: There are slightly under 5,000.  
24 We received the records from the records keeper. It  
25 is about 4,991, folks.

1 THE COURT: All right.

2 Do you have anything else to add? I read your  
3 submission.

4 MR. GYANDOH: No, Your Honor.

5 THE COURT: Anything else to say?

6 MR. GYANDOH: Just that I think we are extremely  
7 proud of the settlement. We congratulate opposing  
8 counsel. It is hard-fought, and I think it's good  
9 for the class.

10 THE COURT: Right. Thank you. Do you have  
11 anything to add, Mr. Williams?

12 MR. WILLIAMS: No, sir.

13 THE COURT: Oh, come on. All right.

14 How about our friends from the defense side? Do  
15 you have anything to add?

16 MR. FREDERICKSEN: No, Your Honor.

17 THE COURT: All right.

18 Let me make some preliminary findings for the  
19 class settlement.

20 I find that the parties, the members of the  
21 class are so numerous that joinder of all of them is  
22 impractical, and that they all share common questions  
23 of law and fact, namely how the money was invested  
24 and whether the people doing the investing or  
25 advising them, whether they knew that the company was

1     doing poorly.

2             The claims of the representative parties, they  
3     are all employees or former employees of Land  
4     America, who were members of the retirement plan who  
5     fell into the same unfortunate boat as the rest of  
6     the people. They not only wound up not having a job,  
7     but they wound up losing a fair amount of their  
8     retirement.

9             I find that the class representatives were  
10    fairly and adequately protecting the interests of the  
11    class. And I find that class counsel is more than  
12    capable of handling this case, this kind of case, and  
13    has a good track record all over the country of doing  
14    these kinds of things.

15            So that satisfies .3A. As to 23B3, I find  
16    that -- what -- hold on one second.

17            Isn't there a 23B class?

18            MR. GYANDOH: Yes, Your Honor, 23B1.

19            THE COURT: OKAY.

20            All right. Okay. Let me look at -- I thought  
21    this was a 23B3 class. Why did I look at 23B1? All  
22    right. I find that if all the class members, or a  
23    number of the class members prosecuted separate  
24    actions there would be a possibility or strong risk  
25    of inconsistent or varying adjudications, and that as

1 a practical matter although it wouldn't be res  
2 judicata, resolution of the case with respect to some  
3 of them would pretty much take care of the case for  
4 all of them. So I find that 23B1 is satisfied.

5 So tell me a little bit about how far you all  
6 went in discovery in this case, and what informal  
7 discovery you did in this case.

8 MR. GYANDOH: Of course, Your Honor.

9 Initially the case was filed in 2011, but we had  
10 to -- we withdrew the case without prejudice to  
11 re-file again in 2013.

12 As far as discovery is concerned, we did engage  
13 in informal discovery at first asking for  
14 plan-related documents from the defendants, and as we  
15 got into the case we asked for -- we asked for  
16 documents from the trustee, the bank trustee, which  
17 is involved in the bankruptcy case. This is  
18 information we used for the settlement negotiations  
19 in this case, and consisted of the plan committee  
20 meeting minutes, board of directors meeting minutes,  
21 and other documents related to the Bank America  
22 stock. But there are still additional, many  
23 terabytes of information that the plaintiff's trustee  
24 had held, which was willing to be produced, but in  
25 all we reviewed probably in addition to the excellent

1 discovery produced a lot of publicly available  
2 information, because this case was based on, from our  
3 point of view, they were publicly available. So we  
4 reviewed several thousand documents and pages of SEC  
5 filings, and related filings to the Land America  
6 business.

7 THE COURT: Okay. What was the amount of stock  
8 that was put into the plan that essentially turned  
9 out to be worthless, or close to worthless?

10 MR. GYANDOH: You know, the class period starts  
11 in November -- sorry -- in June 30<sup>th</sup> of 2008. And  
12 the way we figured out how much was in there is that  
13 at the beginning of the class period there was  
14 approximately eight -- well, about 850,000 shares of  
15 Land America stock for the 2008 period. So the price  
16 of the company stock was \$22 at the start of the  
17 class period. That comes out to about \$18 million  
18 worth of stock in the plan when the class period  
19 started. That settlement class period started as  
20 early as February. So the stock price was a little  
21 higher. So still about around \$20 million. By the  
22 end of the class period, which was July of 2009, the  
23 stock was virtually worthless. About \$76,000 left in  
24 the plan. The company actually went bankrupt in  
25 November of 2008.



1 THE COURT: Okay.

2 Tell me, have you taken any depositions in the  
3 case?

4 MR. GYANDOH: We did not get depositions in this  
5 case, Your Honor.

6 You know we filed -- we had, you know, we  
7 started informal settlement discussions and  
8 eventually we made the motion to dismiss, filed an  
9 amended complaint and motion to dismiss, and  
10 afterwards the parties made an attempt to settle.  
11 But we had no depositions, I mean discovery  
12 production.

13 THE COURT: Tell me the risk the plaintiffs  
14 faced going forward with the case.

15 MR. GYANDOH: Of course, Your Honor.

16 THE COURT: I know there is a risk you might  
17 lose.

18 MR. GYANDOH: Yes. I think particularly in  
19 these ERISA cases, stock cases, I think I will give  
20 you an example. Just overall, only a few of these  
21 cases have come to trial. In our brief we mentioned  
22 actually a case in this district, U.S. versus  
23 Airways. And that ended in a defense verdict. My  
24 firm, and I was counsel in that firm, we tried a case  
25 to verdict and we lost in the Northern District of

1 Illinois.

2       The problem that plaintiffs face, and faced in  
3 this case in particular, is that -- is one of  
4 liability. One of the issues is exactly when was it  
5 prudent, when did the stock become imprudent? You  
6 are going to have different opinions on that.  
7 Because if there is -- no court has decided what the  
8 exact client did. One of the problems we faced here  
9 was the short class period. It started in June of  
10 2008, and the company went bankrupt in November of  
11 2008. So obviously the defendants did make this  
12 argument, when was the fiduciary supposed to know  
13 when, what -- when to cut lose? Defendants made the  
14 argument it wasn't until November 21<sup>st</sup> when  
15 Fidelity backed out of the agreement to buy Land  
16 America that they knew it was imprudent.

17       Well, the very next day, next trading day, the  
18 stock was at 51 cents. If we went to trial and The  
19 Court found liability on that date, we are talking  
20 about damages of \$432,000. And the fact The Court  
21 could also find that there is no practical way a  
22 fiduciary would have known that, including that date,  
23 and not even final liability, that has been the case  
24 in the four cases that have gone to trial.

25       Additionally, you know, even though we won the

1 motion to dismiss, but I acknowledge in the  
2 plaintiff's cases where even The Court granted or  
3 denied a motion to dismiss they do acknowledge these  
4 cases are inherently difficult to prove.

5 So we are faced with a situation where we knew,  
6 best case scenario, if we went to trial maybe we  
7 would get \$18 million. Because the way you measure  
8 damages here is you take the opportunity cost, what  
9 the amount of money that the plan lost, and what  
10 would have been gained if you put it in another  
11 investment. In that period of time, in 2008, most  
12 of -- the stock market was down for almost, for most  
13 investments. I take note there were about 14 other,  
14 13 other investments in the Land America plan. I  
15 think each of them went down during that time period.  
16 So probably the most prudent investment would have  
17 been money market fund. Best case, 18 million or so.  
18 Worst, around \$2,000, or nothing at all if The Court  
19 found that percentage. So we are balancing these,  
20 this reality. But we decided we should settle for  
21 the amount we settled for.

22 THE COURT: All right. Thank you.

23 MR. GYANDOH: Sure.

24 THE COURT: You know, the value of the assets in  
25 the Gibney Retirement Fund went down pretty

1     remarkably during that period of time, too, but now I  
2     have a better retirement plan by far.

3             Okay.

4             I find that the settlement is reasonable given  
5     the reasonable balance of the risks of litigation  
6     versus the possible award of going forward with the  
7     case. I find that the case has moved forward from  
8     its inception, and the plaintiffs have compiled an  
9     adequate amount of information to make an informed  
10    judgment about the case.

11            And did you have a mediator in this?

12            MR. GYANDOH: We did, Your Honor. We actually  
13    started out with a private mediator, but the  
14    settlement we are presenting today was through Judge  
15    Novak.

16            THE COURT: If he settled it, your arms are  
17    probably out of their joints.

18            So I find that the negotiations were done at  
19    arm's length. And obviously counsel are experienced  
20    in this whole thing. I will preliminarily approve  
21    the settlement.

22            I will -- I have your draft order. I will go  
23    back and re-read it to make sure that it says what I  
24    thought it said and enter it later today or tomorrow  
25    morning.

1           And we have a date set for the final approval;  
2    is that correct?

3           MR. GYANDOH: That's correct, Your Honor, July  
4    20th.

5           THE COURT: Okay. So we have got some moving to  
6    do between now and then, but I think that should be  
7    taken care of.

8           Do the defendants have anything you want to add?

9           MR. FREDERICKSEN: Nothing additional, Your  
10   Honor.

11          THE COURT: All right.

12          Well, thank you all very, very much for a good  
13   job on this case.

14          The last time you were here I was a little hard  
15   on you all on the amount of legalese in the documents  
16   in this case. You know, I had just finished reading  
17   the rules and they stated they are supposed to be  
18   comprehensible to people who are in the class. I  
19   apologize for being harsh on you. All right.  
20   Anything else?

21          MR. FREDERICKSEN: Thank you, Your Honor.

22          THE COURT: Thank you very much.

23                       HEARING ADJOURNED.

24          THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT.

25                       GILBERT FRANK HALASZ, RMR  
                         OFFICIAL COURT REPORTER